

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES SECURITIES AND  
4 EXCHANGE COMMISSION,

5 Plaintiff,

6 v.

16 CV 2733 (RJS)

7 KHALED KAL BASSILY,

Telephone Conference

8 Defendant.

9 -----x  
10 New York, N.Y.  
11 February 17, 2017  
12 11:30 a.m.

13 Before:

14 HON. RICHARD J. SULLIVAN

15 District Judge

16  
17  
18 APPEARANCES

19 THOMAS A. BEDNAR  
20 SARAH L. ALIGEIER  
21 Attorneys for Plaintiff

22 AKIN GUMP STRAUSS HAUER & FELD LLP  
23 Attorneys for Defendant  
24 BY: ROBERT H. HOTZ, JR.  
25 M. CHRISTINE SLAVIK  
KATE L. POWERS

(Case called)

THE COURT: Good morning to each of you. The reason I asked for this conference call is I know that this case had originally been assigned to Judge Torres, who referred it to Magistrate Judge Ellis, and discovery has been proceeding under Judge Ellis's discovery schedule and case management plan.

I typically don't refer to magistrate judge's discovery; I like to keep it myself. As I looked at Judge Ellis's schedule, it seemed to me this is a long schedule. I don't really know exactly what is going on, and I'm deciding whether I want to withdraw the referral and take it myself or whether things have already progressed to the point where that is not worth doing. That is the purpose of this call.

I have great respect and admiration for Judge Ellis. It is nothing personal. I just like to do my own discovery. Where are we at with Judge Ellis? Is he involved in this process with you?

MR. BEHAR: Your Honor, we appeared in front of Judge Ellis for an initial scheduling conference, introduced ourselves and the case. Once our scheduling order was entered, we have been able to proceed with discovery without any issues that we haven't been able to resolve among ourselves. So we have not had to enlist the court for anything. We have not appeared in front of Judge Ellis since that initial scheduling conference.

1 THE COURT: That helps. Thank you. His scheduling  
2 order doesn't use hard dates. It is dates triggered or pegged  
3 off of the date of his order. I generally give hard dates so  
4 everybody knows what is happening and when it is happening  
5 without having to do math.

6 MR. BEHAR: Your Honor, we have created an annotated  
7 version of that that Mr. Hotz and his team created. We have  
8 provided that to Judge Ellis, and we can send that to chambers,  
9 perhaps should have done that already.

10 THE COURT: Tell me, when does fact discovery end  
11 according to your annotated version?

12 MR. HOTZ: March 15, 2018, I believe, your Honor.

13 Tom, is that your understanding?

14 MR. BEHAR: Yes.

15 THE COURT: March 15, 2018. That seems like a long  
16 way away. You're optimistic. We might not even be alive by  
17 then. There may be a giant meteor that takes us out.

18 MR. HOTZ: I'm confident we will be alive by then.

19 THE COURT: The Mayan calendar might suggest  
20 otherwise, Mr. Hotz.

21 MR. HOTZ: Your Honor, if I may be heard briefly on  
22 this?

23 THE COURT: Sure.

24 MR. HOTZ: I would like to explain why from our  
25 perspective I think the current schedule is more than

1 reasonable to tell you what is proceeding apace. As your Honor  
2 is well aware, the amended complaint contains new allegations  
3 and new customers, and we are moving full steam ahead through  
4 the discovery process right now.

5 We have a vendor engaged. We have 7 million pages of  
6 discovery. We received another bunch of discovery, which is  
7 smaller, to be clear, but by my count included approximately 70  
8 FBI 302s. We also received supplemental disclosures from the  
9 SEC. We expect to be filing our own supplemental disclosures.

10 At least from what I have seen, your Honor, I think  
11 there are a number of issues that make this case unique that  
12 require discovery. I envision there will be substantial  
13 discovery from third parties.

14 As Mr. Bednar and I indicated in the letter he  
15 submitted to the Court, I think there will be a substantial  
16 amount of third-party discovery from what I will call  
17 colloquially the customers, the entities that engaged  
18 Convergenx, many of whom, as we indicated in our letter, would  
19 require letters rogatory and a process around that. Mr. Bednar  
20 and I have set up proposed dates in the proposed letter to meet  
21 and confer around and to set up a schedule to do that. That  
22 will take considerable time.

23 In addition, your Honor, we have again an issue which  
24 is critically important for our defense, which is the issue of  
25 the prices the clients received and the execution they

1 received. I have set up a meeting with Mr. Bednar for March  
2 3rd to go to the SEC's office and review the GPRO system, which  
3 as I understand it would contain the trade information from the  
4 Bermuda affiliate that would reflect the taking of the TP or  
5 spread that is at issue here.

6 I don't want to prejudge that, but from what I  
7 understand, this is a very complicated system. I have  
8 requested a copy from the SEC. Mr. Bednar doesn't have another  
9 copy. I expect one of the things I will be requesting from  
10 Convergenx is that data. Without previewing it or prejudging  
11 it, I think that is a very complicated and massive amount of  
12 data that has to be reviewed and analyzed. I think that is  
13 also going to require experts, as I indicated.

14 Lastly, your Honor, as I also indicated, there is  
15 likely to be significant expert testimony both on this data  
16 that I just mentioned but also on the transitions in the market  
17 generally, as well as materiality, and also, as I mentioned in  
18 the argument on motion to dismiss, disgorgement.

19 There is quite a lot to be done, your Honor. We are  
20 moving expeditiously and doing all we can reasonably do to get  
21 this done as quickly as possible. As Mr. Bednar indicates,  
22 have had an ability to work through our differences and have  
23 had no need to enlist Judge Ellis.

24 THE COURT: Do you have an opinion as to whether I  
25 should withdraw the referral and take this over myself? That's

1 a tough question to ask a lawyer. Maybe I shouldn't ask that.

2 Do you have any objection to it?

3 MR. HOTZ: Your Honor, I have no objection to your  
4 withdrawing the referral and overseeing the discovery process  
5 yourself. I would be more than happy to have your Honor  
6 preside over whatever discovery issues we have.

7 THE COURT: Tell me about expert discovery. I'll come  
8 back to the SEC in a minute. Expert discovery will consist of  
9 what?

10 MR. HOTZ: Your Honor, it is difficult for me to be  
11 more precise than I was, but I envision an expert that is going  
12 to have to go through and analyze the GPRO data because I think  
13 an issue that is squarely at issue in the case is the amount of  
14 spread, the spread that was taken. We are going to need to  
15 have an expert go through that data and analyze that.

16 I also envision an expert more broadly on the question  
17 of transition management, what transition management is and the  
18 types of considerations that go into a customer's decision to  
19 pick a specific transition manager. Also on that score,  
20 relatedly, I think there would be expert testimony similar to  
21 that in the Litvak case, which no doubt your Honor is familiar  
22 with, on the issue of materiality here.

23 Lastly, as I think your Honor described it in an oral  
24 argument on the motion to dismiss, an expert which would  
25 effectively be on the issue, assuming the worst, of

1 disgorgement. You called it I think a damages expert, but I  
2 view it as a disgorgement expert.

3 Those would be in broad strokes the areas for expert  
4 testimony.

5 THE COURT: Let me ask the folks at the SEC if they  
6 have a view or an objection to my taking over the discovery  
7 stage of this and if they have thoughts about expert discovery  
8 and the timetable here.

9 MR. BEHAR: Your Honor, no objection to the Court  
10 taking over management of discovery. As to the overall  
11 schedule, given the number of likely depositions and the fact  
12 that some of those will be overseas and might involve use of  
13 letters rogatory, we think the overall schedule is reasonable.

14 I had hoped to get through the litigation with far  
15 fewer types of experts than what Mr. Hotz is indicating he will  
16 pursue. That may cause me to go back to the drawing board to  
17 make sure that we have enough expertise. I think the SEC is  
18 likely to have one or two experts on general broker-dealer  
19 operations and considerations in the transition management  
20 industry. I don't think we are going to cover as much of the  
21 waterfront as the defense, but we will have at least one  
22 expert.

23 THE COURT: The plan is March 2018 for fact discovery  
24 when? June or July for expert discovery?

25 MR. HOTZ: June 15th, 2018, your Honor, according to

1 the annotated version of the order, we have to June 15, 2018.

2 That is in paragraph 7(a), I believe.

3 MR. BEHAR: Right. Your Honor, we have that  
4 envisioned as 30 days after the end of fact discovery all  
5 expert reports are due at the same time, 30 days after for all  
6 rebuttal reports, and within 30 days of that we would finish  
7 depositions of those experts. I still think that that is  
8 realistic.

9 THE COURT: Did Judge Ellis schedule a post-discovery  
10 conference date or anything like that?

11 MR. BEHAR: Not with the Court, but a meet-and-confer  
12 between the parties 30 days before the close of fact discovery.

13 THE COURT: What I am going to ask you folks to do is  
14 send me the document that you have been referring to. Also  
15 take a look at my template case management plan and scheduling  
16 order and see if you think that you can plug in your annotated  
17 arrangement into mine. If you think you can't, just tell me  
18 that. But if you think that you can and if you have to add  
19 things, add things; I don't mind that.

20 I'm contemplating doing a different case management  
21 plan that more or less tracks my standard order tweaked as  
22 needed, because this is not a typical case by any means. Then  
23 also what you have been referring to today so I can get a  
24 better handle on the discovery. That is I think the direction  
25 I'm headed in.



1 I'm probably going to amend the referral, have the  
2 referral to Judge Ellis go forward only with respect to  
3 settlement, which is what I typically do with magistrate judges  
4 in my cases. Have you thought about when you would be in a  
5 position to talk about settlement?

6 MR. HOTZ: Your Honor, in the letter we jointly sent  
7 you, Mr. Bednar and I envisioned that we would have discussions  
8 and meet and confer on the issue of settlement on April 19th  
9 and on June 30th. I think April 19th would be premature to  
10 involve the magistrate, at least from my perspective. But it  
11 may well make sense on June 30th to involve Magistrate Judge  
12 Ellis, from my perspective, just given the volume of discovery  
13 here.

14 THE COURT: Mr. Bednar?

15 MR. BEHAR: That sounds reasonable.

16 THE COURT: Let's do that. If you can within a week  
17 get me a copy of what you have been referring to and maybe a  
18 crack at trying to plug into my standard template the  
19 agreements that you have got in place, that will allow me to  
20 know whether it makes sense to do this. I'm inclined to amend  
21 the referral.

22 MR. BEHAR: Yes, your Honor.

23 MR. HOTZ: Yes.

24 THE COURT: That's what I wanted to chat about. Is  
25 there anything else that was on anybody's mind?

1 MR. BEHAR: Not for the SEC.

2 MR. HOTZ: Not regarding this matter, your Honor.

3 There are many things on my mind, but not on this. Always nice  
4 to speak to you and Tom.

5 THE COURT: Thanks a lot. If anybody needs a copy of  
6 this transcript, which I doubt, if you want to, you can take  
7 that up with the court reporter Mr. Murray through the website.

8 (Adjourned)

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